Supreme Court, U. S.
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No. 79-1165

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM J. SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks interlocutory review of an order denying his pretrial motion to disqualify the United States Attorney on the basis of an alleged conflict of interest from representing the government at the petitioner's criminal trial.

The pertinent facts are as follows: Petitioner, the Attorney General of Illinois, was indicted in the Northern District of Illinois on four counts of willfully making and subscribing false individual income tax returns for 1972-1975, in violation of 26 U.S.C. 7206(1). Petitioner moved to dismiss the indictment on the ground that Thomas P. Sullivan, the United States Attorney for the Northern District of Illinois, was not authorized to appear before the grand jury that returned petitioner's indictment; he

thereafter moved to disqualify Mr. Sullivan, because of an alleged conflict of interest under 18 U.S.C. 203, from representing the government at petitioner's trial. The district court denied both motions (Pet. App. A4), and the court of appeals affirmed (Pet. App. A1-A2). The court of appeals denied petitioner's motion to stay the criminal trial (Pet. App. A5), and, on January 8, 1980, Mr. Justice Stevens denied petitioner's application for a stay. Petitioner's trial began on January 8, 1980, and the case was submitted to the jury on March 14, 1980.

Petitioner's sole argument (Pet. 7-12) is that the United States Attorney should be barred from representing the government in this case because of an asserted conflict of interest. Specifically, he contends (Pet. 10-12) that the United States Attorney, in his previous tenure as a partner in a large Chicago law firm, frequently served as counsel in cases in which petitioner, as Illinois Attorney General, was either opposing counsel or an opposing party.

Although the court of appeals treated the denial of petitioner's disqualification motion as a final order and affirmed on the merits, we believe that an order of this sort is functionally indistinguishable from the myriad of interlocutory orders entered in criminal cases that must await review following entry of a final judgment. See *United States* v. *MacDonald*, 435 U.S. 850 (1978). Even if petitioner's claim were ultimately deemed to have merit—and we agree with the court of appeals that it is insubstantial—petitioner will suffer no unique and irremediable injury by being required to present it, along with such other objections he may have, on appeal from a final judgment in the event he is convicted. It is thus not one of that narrow class of claims, such as a double jeopardy claim (see *Abney* v. *United States*, 431 U.S. 651

(1977)), that is so distinct from the trial itself that it is properly deemed a collateral order subject to immediate review.

Moreover, quite apart from appealability, review by this Court at the present time is inappropriate. After more than a two-month trial, the jury is now deliberating the evidence. It would be pointless for this Court to grant review under the circumstances, since it would be many months before a decision could be rendered—a decision that might be wholly unnecessary if petitioner were acquitted or if he were able to secure a reversal of a conviction on some other ground, either of which events would moot his present claim.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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